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No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.,
and
INSURANCE COMPANY OF NORTH AMERICA, *Petitioners,*
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
RALPH RILEY, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONERS, U.S. INDUSTRIES/ FEDERAL SHEET METAL, INC., AND INSURANCE COMPANY OF NORTH AMERICA

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QUESTIONS PRESENTED

1. Whether there is any statutory requirement under the Longshoremen's and Harbor Workers' Compensation Act for a claimant to prove the occurrence of an "accidental injury arising out of and in the course of employment" (33 U.S.C. 902(2)).

2. Whether the statutory presumption, under 33 U.S.C. 920(a), applies to the term "in the course of" as well as "arising out of".

3. Whether the statutory presumption, under 33 U.S.C. 920(a), should be applied when there was substantial evidence of record before the Court below to rebut the presumption, and affirm the findings of the Administrative Law Judge and Benefits Review Board.

STATEMENT PURSUANT TO RULE 28.1

1. Pursuant to Rule 28.1 of this Court's Rules, Petitioner U.S. Industries/Federal Sheet Metal, Inc., attaches hereto, as Appendix A to this brief, a listing, naming all of its parent companies, subsidiaries, and affiliates.

2. Pursuant to Rule 28.1 of this Court's Rules, Petitioner Insurance Company of North America states that it is a wholly-owned subsidiary of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation. Insurance Company of North America's subsidiaries and affiliates are: Compagnie d'Assurances Colina, S.A. (Ivory Coast), Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); INA International Investors Ltd., (Pennsylvania); La Nouvelle, S.A. (France); Paine Webber Incorporated (Delaware), and its 68 subsidiaries and affiliates; and Societe Civile Immobiliere Turina (France). Attached hereto, as Appendix B to this brief, is a listing naming all of its parent companies, subsidiaries, and affiliates.

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On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals, denying the Petition for Rehearing, is unreported and reproduced as Appendix A to the Petition for Certiorari. The opinion of the Court of Appeals, denying Suggestion for Rehearing En Banc, is also unreported and reproduced as Appendix B to the Petition for Certiorari. The Court of Appeals' decision is reported at 627 F.2d 455 (1980), 11 BRBS 298 and reproduced in its entirety at Appendix C to the Petition for Certiorari. The decision of the Benefits Review Board is reported at 9 BRBS 936, and is reproduced in its entirety as Appendix D to the Petition for Certiorari. The decision of the United States Department of Labor, Administrative Law Judge, is unreported

and reproduced in its entirety as Appendix E to the Petition for Certiorari.

JURISDICTION

The decision of the Court of Appeals was entered on May 22, 1980. The order of the Court of Appeals denying the Petitions for Rehearing and for Suggesting Rehearing En Banc was entered on July 3, 1980. The order allowing Certiorari was filed on March 9, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

The provisions of chapter 18 of title 33 U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 33:

§902. *Definitions*

When used in this chapter —

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

§903. *Coverage*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury. . . .

* * *

§920. *Presumption*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary —

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, §20, 44 Stat.1124

§921. *Review of Compensation Order*

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occured, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. . . .

* * *

STATEMENT OF THE CASE

This Petition arises out of a claim by Respondent Ralph Riley ("Riley") for workers' compensation benefits from U.S. Industries/Federal Sheet Metal, Inc. ("U.S. Industries"), and their workers' compensation insurer, The Insurance Company of North America ("INA"), pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, as extended by the District of Columbia Workers' Compensation Act ("Act")[1]

[1] Act of March 4, 1927, c.509, 44 Stat. 1124, as amended, 33 U.S.C. 901 *et seq.* (1967), made applicable to the District of Columbia by the Act of May 17, 1928, c.612 §§1, 2, 45 Stat. 600, as amended, D.C. Code §§36-501, 36-502 (1963).

On November 20, 1975, Riley awoke at home about 2:30 a.m. with tightness in his chest and pain in both arms, and neck (J.A.[2] 26). He was taken by his wife to Physicians' Memorial ("LaPlata") Hospital, about thirteen miles away, where he was examined and admitted (J.A. 26; Respondents' Ex.C R. 103; J.A. 89-99) until November 25, 1975 (J.A. 97). No history of injury on the job was given by either Riley or his wife to any of the physicians who treated him in the hospital, which included cardiologist, Dr. Henry Burke, and Dr. Alvaro Sanchez, an orthopedist. Initially, he had been admitted to the Coronary Care Unit of the hospital to rule out myocardial infarction (J.A. 96, 98) but, by the time of discharge, the diagnosis was cervical arthritis, and he was thereafter referred for further care to his private physician, Dr. Herbert Wisotsky (J.A. 44, 99).

Dr. Wisotsky had been treating Riley for arthritis since 1970 (J.A. 131). At that time, he sent Riley to Cafritz Hospital, Washington, D.C., where x-rays confirmed arthritic changes (J.A. 128-129). Since May 1975, Riley had been again under Dr. Wisotsky's active care for arthritis when he had been "off-work" because of neck, shoulder, and arm pains (J.A. 134). Prior to November 1975, Dr. Wisotsky had discussed retirement with Riley because of his cervical arthritis (J.A. 139, 142), and prescribed medication to him for treatment of the arthritis. Dr. Wisotsky did not see Riley in the hospital in November, but saw him in his office on December 1, 1975 for "anxiety" (J.A. 134). There was no mention at all to Dr. Wisotsky, on this first visit since July, of a job-related injury causing the November hospitalization (J.A. 135). Dr. Wisotsky saw him again on December 5, and then referred him to

[2] "J.A." references are to the Joint Appendix filed herein.

rheumatologist, Dr. Scalettar, and psychiatrist, Dr. Maguigad, who also examined him in December (J.A. 151-153). There was again no mention by Riley to Drs. Scalettar and Maguigad of any on-the-job occurrence or incident of increased arthritic pain (J.A. 151-153).

On December 16, 1975, Riley retained counsel (J.A. 32). On December 19, 1975, Riley saw Dr. Sanchez, and told him that he "forgot" to mention that he had "strained" his neck while moving duct work at Walter Reed Hospital on November 19, 1975 (J.A. 160). Nothing had been stated to Dr. Sanchez previously about an alleged injury at work (J.A. 165). On December 29, 1975, Riley's retained counsel filed a claim for workers' compensation with the United States Department of Labor (Claimant's Ex. 2, R.73; J.A. 34, 80-81). On this claim form, Riley alleged that an "accident" occurred while "lifting duct work weighing approximately 500 pounds and felt a sharp pain in neck". On July 16, 1976, he also filled out a claim for INA, asserting he had "struck his neck and shoulders on duct work" (Respondents' Ex. B, R.100; J.A. 86-87).

Prior to November 20, 1975, Riley had been employed by U.S. Industries at Walter Reed Hospital in the District of Columbia for approximately three weeks (J.A. 12, 21). He had been working there with his friend of fourteen years, Howard Sutherland, with whom he regularly commuted to and from work. Prior to this employment, both men had been off work and on unemployment compensation for six months, after working three and one-half years at Chalk Point Power Plant in Maryland (J.A. 13). Mr. Sutherland testified he first learned of Riley's hospital admission from Mrs. Riley, who called him at 5:30 to 6:00 o'clock in the morning on November 20, advising him of Riley's hospitalization

(J.A. 11). Mr. Sutherland testified he went to the job site that day and reported that Riley was in the hospital with chest, arm, and neck pains (J.A. 11). The employer received no report of job-related injury to Riley from its foreman, John Fury, (R. 216), but Fury was aware, three or four days later from Sutherland, that Riley was hurt and it was a heart attack. (J.A. 77).

When the case was tried before an Administrative Law Judge, Riley and his fellow employee, Sutherland, testified that an "injury" had happened while at work on November 19, 1975. However, the Administrative Law Judge rejected the claim, finding, as a fact, that Riley had failed to prove an accidental injury under 33 U.S.C. §902(2), and that he and Sutherland had given false testimony concerning the happening of an "accident" (see Pet. App. E). This decision of the Administrative Law Judge was affirmed by the Benefits Review Board with a dissent (see Pet. App. D). Riley petitioned for review, pursuant to 33 U.S.C. §921(c), to the United States Court of Appeals for the District of Columbia. On appeal, the Director, Office of Workers' Compensation Programs, intervened and adopted the dissent of Judge Miller of the Benefits Review Board. The Court of Appeals reversed the Benefits Review Board, holding that, under the facts of this case, there is a presumption that an "accidental injury" had occurred, and the Administrative Law Judge's decision was contrary to law because he failed to apply the presumption in Riley's claim (see Pet. App. C). The Court below held that because Riley had awakened in pain on November 20, 1975, he suffered an "injury" and that by requiring Riley to prove an accident did, in fact, occur, the Administrative Law Judge denied the claimant benefit of

that presumption. The Court further found that the Administrative Law Judge and Benefits Review Board had relied upon a "narrower statutory presumption" than required by the statute and vacated the decision of the Benefits Review Board and remanded "for full consideration of Petitioner's claim in light of this opinion". (J.A. 11) The Court made no comment or finding as to whether or not the evidence produced in the case was "substantial evidence" to rebut the presumption.

SUMMARY OF ARGUMENT

Petitioners, U.S. Industries, et al., assert that the clear terms of the statute require that compensation shall be awarded for "accidental injuries arising out of and in the course of employment".[3] Riley asserted that his disability occurred when he suffered a traumatic accident causing aggravation of his underlying cervical arthritis, and that this "accident" and "injury" occurred at work on November 19, 1975. The Administrative Law Judge hearing the case found, as a fact, that no such incident at work ever occurred, and that Riley and his co-employee gave false testimony concerning the happening of an accident on that date. The Administrative Law Judge also stated that the statutory presumption under 33 U.S.C. §920(a) did not apply to assist the claimant in proving the disputed fact as to whether or not an accidental injury, arising out of and in the course of employmet, had occurred.

The Court below did not decide whether the decision of the Administrative Law Judge was based on

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[3] It may also be awarded for occupational disease "arising out of employment" but there is no statutory requirement in the occupational disease portion of the definition that the disease occur "in the course of" employment. 33 U.S.C. §902(2). The opinion in *Riley* did not involve the definition or interpretation of "occupational disease."

substantial evidence, but U.S. Industries asserts that it was. Instead, the Court erroneously determined that the "agency's underlying standards are not in accord with law". The Court further held that the Administrative Law Judge had denied Riley the statutory presumption that his injury "arose out of and in the course of employment" on November 20, 1975, when he awoke at home at 2:30 in the morning, and went to the hospital for treatment of chest pain.

U.S. Industries urges that the effect of the Court's decision is to make Riley's home life part of his work environment, so that Riley's "injury", when he awoke at 2:30 in the morning, would trigger a presumption of work-relatedness and its rebuttal by U.S. Industries.

U.S. Industries asserts that the strained reasoning of the Court, is an unwarranted extension of the definition of injury under this Act, to make all conditions of life arising during non-work times and in non-work places, *prima facie* compensable. Such interpretation of the Act is contrary to legislative history, and the interpretation given to the words "out of" by this Act and the workers' compensation law of the state of New York, from which this Act was borrowed. U.S. Industries contends that the Court's findings eliminate the requirement of the statute that the employee prove an "accidental injury" arising "in the course of employment", before it can be presumed to occur "arising out of the employment". U.S. Industries asserts that, if the "accidental injury" did not occur in the course of employment, no presumption applies, and sufficient proof must be presented by the claimant that the accident "arose out of" employment.

ARGUMENT

I

Riley Sustained No "Injury" Within The Meaning Of The Statute

When the case was tried before the Administrative Law Judge, Riley claimed a traumatic injury "arising out of and in the course of employment" on the afternoon of November 19, 1975, when he was allegedly injured in the course of his employment with U.S. Industries. (R. 6) He testified that on that date he struck his neck against duct work on the job. (J.A. 22) After hearing all the evidence, the Administrative Law Judge concluded that Riley "sustained no injury within the meaning of Section 2(2) of the Act on November 19, 1975", as alleged, and that Riley and Sutherland gave false testimony as to the happening of an accident. (Pet. App. 24a) This finding was affirmed on appeal by the Benefits Review Board, but reversed by the Court below.

This Petition seeks review of the Court of Appeals' finding that Riley "suffered an injury" when he awakened in pain on November 20, 1975. (Pet. App. 7a) A review of the decisions of the Administrative Law Judge, Benefits Review Board and Court of Appeals in *Riley*, indicates that this finding was never previously made nor raised, briefed or argued by the parties and, accordingly, should not have been raised by the Court. See *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *Smith* v. *American Guild of Variety Artists*, 368 F.2d 511, 514 (1966). This legal and factual error by the Court is not cured by a remand, since the Court of Appeals is, by virtue of its decision, granting a "new trial" to Riley where there was no mistake of fact on the part of the Administrative Law Judge in framing the issues tried before him.

The Court of Appeals noted that the Administrative Law Judge focused on the accident which allegedly occurred on November 19, 1975, but then states that the Judge's finding that no accident, in fact, occurred is not responsive to the issue "properly presented for resolution". (Pet. App. 10a) It can only be concluded, from the foregoing language of the Court of Appeals, that the issue was "not responsive" to the question which the Court of Appeals wanted to review. Even though the Administrative Law Judge found that Riley "sustained no injury within the meaning of Section 2(2) of the Act" on November 19, 1975, the Court erroneously decided that the Administrative Law Judge focused on the accident which allegedly occurred on November 19, 1975, and instead should have focused on the "injury" which it found "when he awakened in pain on November 20, 1975". (Pet. App. 7a) Concluding, the Court stated:

> "Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been employment-bred." (Pet. App. 10a)

Having then resolved all the factual and legal issues in favor of Riley's claim, the Court of Appeals then summed-up its findings by stating:

> "Because the Administrative Law Judge and the Benefits Review Board relied upon a statutory presumption narrower than that elaborated here, the agency did not make all the findings necessary for a proper disposition of petitioners' claim. We cannot anticipate what these findings will be. See *Vendemia* v. *Cristaldi*, 221 F.2d 103, 106 (D.C. Cir. 1955)." (Pet. App. 11a)

The Court of Appeals thus disposed of the matter on a ground not raised by Riley or the Federal Respondent before the Administrative Law Judge, or before the Benefits Review Board.

Because Riley was hospitalized during the early morning hours of November 20, 1975, the Court found that Riley suffered an "'injury' as that term has been heretofor construed under the Act". (Pet. App. 8a) U.S. Industries assert herein that the Court's finding that Riley suffered an "injury" when he awoke early in the morning with chest pain *at home*, is contrary to the specific definition of "injury" as defined in the Act, and as meant by the Administrative Law Judge, when he made his finding that the claimant sustained "no injury within the meaning of Section 2(2) of the Act on November 19, 1975". (Pet. App. 24a)

Under the Act, "injury" is defined as follows:

§902. Definitions

When used in this chapter —

* * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

The Court of Appeals, in its decision, focused only on the term "accidental injury arising out of and in the course of employment", and not "occupational disease", as it is defined or interpreted under the Act. (Pet. App. 7a) The origin of this statutory definition of injury is found in the New York Act.[4] Historically, "in-

[4] Report #1190, 69th Congress, lst Session, H.R. 12063, p.1 (1926). See also, hearing before the Senate Judiciary Committee, 69th Congress, lst Session, S. 3170, pp. 31-32 (1926).

jury", to be covered under a workers' compensation act, had to be caused by an "accident". The requirement that the injury be accidental in character has been adopted either legislatively or judicially, by all but eight states. A. Larson, *Workmen's Compensation Law*, Vol. 1B, §37.10, p. 7-1. The original British term was "by accident", and occurs in the statutes of twenty-seven states. Ten other states, including this Act herein, use the term "accidental injury". The term "accidental injury", as used in the Act, means any unexpected misfortune or mischance resulting in some form of bodily injury. The term "accidental" in compensation statutes, is used in its popular and ordinary sense, and includes an unexpected personal injury resulting to a worker in the course of employment from any unexpected occurrence. *Fidelity & Casualty Company of New York* v. *Burris*, 59 F.2d 1042, 1044 (1932).

The requirement that an accidental injury "arise out of and in the course of employment" occurs in the statutes of thirty states, including New York and the District of Columbia. A Larson, *Workmen's Compensation Law*, Vol. 4, App. A, Table 2, pp. 511-523. However, the terms "arising out of and in the course of" appear in forty-two states. A. Larson, *Workmen's Compensation Law*, Vol. 1, §6.10, p. 3-1.

It is settled, under the Act and as a matter of compensation law generally, that the statutory terms "arising out of" and "in the course of", establish a two-prong test, both elements of which must be met to establish entitlement to compensation. The "arising out of" portion refers to a causal connection or relationship between the injury and the conditions of the employment. The "in the course of" portion refers to the time, place, and circumstances of the accident in relation to the employ-

ment. See A. Larson, *Workmen's Compensation Law*, Vol. 1 §6.10, p. 3-2, (1978), *Ward & Gow* v. *Krinsky*, 259 U.S. 503 (1922), *Cudahy Packing Co.* V. *Parramore*, 263 U.S. 418 (1923); *Ayers* v. *Hoage*, 63 F.2d 364 (1933).

Cudahy Packing Co. v. *Parramore*, 263 U.S. 418 (1923), involved interpretation and construction of these terms under the Utah worker's compensation statute. The Utah Act provided Compensation for personal injury or death of an employee by an accident "arising out of *or* in the course of his employment". (Emphasis added.) After this decision, during Congressional hearings on Bill S. 3170, there was discussion concerning the definition of injury, and the fact that the word "accident" was entirely eliminated from the proposed statute. (*Senate Hearings*, page 54.) However, during hearings before the Committee of the Judiciary of the House of Representatives concerning their proposed Bill, H.R. 9498 (Serial 16, pp. 1-120), O.G. Brown, representing the Council of American Shipbuilders, Inc., and the New York and New Jersey Dry Dock Association, gave testimony concerning agreed changes from the Senate Bill, S. 3170, to change the word "injury" to "accidental injury" and, instead of the disjunctive "or" being used, the Senate Bill would now read "arising out of *and* in the course of employment" (emphasis added), which, Mr. Brown noted, "corresponds with the New York law and most of the other state laws". (*House Hearings*, p. 71.) Neither of the original Bills, S. 3170 or H.R. 9498, passed. However, an amended Bill, incorporating the changes proposed by O.G. Brown, was proposed in Congress the following year and did pass. (See H.R. Rep. 1767, 69th Cong. 2d Sess. S. 3170 (1927).)

This Court's first opportunity to decide a case under the Longshoremen's and Harbor Workers' Compensation Act came in 1932 in the case of *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408 (1932). This case did not deal with the interpretation of "accidental injury" under the Act, nor the definitions of "arising out of" and "in the course of". However, in its decision, this Court stated that the Act:

> ". . . requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and death occuring *in the course of their work*, whether with or without fault attributable to employers." (Emphasis mine). 284 U.S. 414

Because *Riley* presents a question concerning whether the claim for injury is within the Act, the statutory language of the Act must be reviewed. *United States* v. *Charles*, 397 F.2d 712, 714 (1968). There is no question that Riley was an employee of an employer "carrying on employment in the District of Columbia" on his last work date of November 19, 1975.[5] The question is one of coverage, that is, whether Riley suffered an "accidental injury arising out of and in the course of employment". The decision concerning jurisdiction under the Act is with the Deputy Commissioner or Administrative Law Judge. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-507 (1951).

Jurisdiction under the Act only applies when the relation of master and servant exists. *Crowell* v. *Benson*, 285 U.S. 22 (1932). This means that there must be an employer-employee relationship at the time of injury. In short, the employee must be in the scope of employ-

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[5] Act of May 17, 1928, c.612, §§1, 2, 45 Stat. 600, as amended, D.C. Code 36-501 (1963).

ment. As a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done. *Bountiful Brick Co.* v. *Giles,* 276 U.S. 158 (1920). In *Foster* v. *Massey,* 407 F.2d 343, 347 (1968), the D.C. Circuit discussed when a person is "employed" as follows:

> "Generally a person on salary is not considered to be in the course of 'employment' 24 hours a day; rather the employment begins when he reports for work and ends when he leaves his work situs. A person working regularly on a five-day week is "not unemployed two days a week, but at the same time he is not in the course of employment in this statutory sense during those two days. A person who works for a daily wage is not 'employed' when he has no work or fails to go to work." 407 F.2d 347

By his own testimony, Riley's employment with this employer ended at 3:30 p.m. on November 19, 1975. (J.A. 26) Since this testimony indicates that Riley was *not* in the scope of his employment when he experienced pain at 2:30 in the morning when asleep at home (J.A. 26), there is no work-related situs of injury and one of the essential elements of the statutory definition of injury cannot factually be met herein.[6] In fact, when Riley

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[6] U.S. Industries distinguishes the cases of *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), and *O'Keefe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965), which deal with coverage under the Defense Bases Act, 42 U.S.C.A. §1651-1654; *O'Keefe* v. *Pan American World Airways, Inc.*, 338 F.2d 319, 325-326 (5th Cir. 1964). There has also never been a contention by Riley or the Court of Appeals that his work or his home constituted a "zone of special danger" out of which his injury arose. *Director, OWCP* v. *Brandt Airflex Corp.*, _____F.2d _____(Nos. 78-2309, 2314, 2315, February 26, 1981).

suffered symptoms at home on November 20, 1975, he was:

> ". . . so thoroughly disconnected from the service of his employer, that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 507(1951).

Therefore, the Court below should have affirmed the findings of the Administrative Law Judge and the Benefits Review Board. *Norton* v. *Warner Co.*, 321 U.S. 565, 568 (1944).

It was the exclusive duty of the Administrative Law Judge, not the Court below, to determine the credibility of the witnesses, to interpret and evaluate the evidence and to draw inferences therefrom. *Banks* v. *Chicago Grain Trimmers Association,* 390 U.S. 459 (1968). Statutory definitions must control the meaning of statutory words, and although this is a humanitarian Act, which is to be liberally construed, that does not give the Court of Appeals authority to rewrite the Act or retry the case, *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200 (1952).

In order to avoid the statutory definition of "injury", as construed by the Administrative Law Judge, the Court of Appeals invoked a new definition for the "injury" which happened on November 20, 1975 when Riley awoke in pain at home. (Pet. App. 7a) The Court of Appeals uses the term "employment-bred". Before *Riley,* this term had been used only once before, under the Act, in the case of *Vozzolo* v. *Britton,* 377 F.2d 144 (1967). *Vozzolo* involved a truck mechanic who suffered an injury on March 12, 1958 in the course of his employment, when a transmission fell on his chest. The

strain to lift the transmission from his body produced a heart attack, from which he was totally disabled for approximately four months. Vozzolo returned to work, and worked from May 18, 1958 until March 18, 1963, when he left the job again suffering from a second heart attack. The issue in that case concerned whether the claimant had sustained a new and distinct accidental injury in 1963. The Court said:

> "Sequential events originating naturally in an employment accident, and contributing without intervention of an independent cause to an incapacitating injury establish adequately the nexus required. Here, unlike situations where compensation was sought for a condition completely divorced from the incipient injury, the causal chain from accident to disability is clear and complete." 377 F.2d 149 (1967)

The Court noted the issue in the case to be whether the second heart attack (infarct), like the first, resulted from "an employment-bred aggravation of the employee's arteriosclerotic condition". The Court observed that there was no specific event as a catalyst for the 1963 infarction, however, it stated that it was "causally related to an event transpiring in the course of employment and, therefore, it was unnecessary for the employee to demonstrate that it was additionally brought on by some new job-connected occurrence". The Court, therefore, found that the 1963 infarction was a continuum of the original work-connected aggravation of symptoms which occurred in 1958, and was thus compensable. The language "employment-bred" constituted *dicta* in *Vozzolo,* because the Court correctly decided that, factually and medically, the 1963 infarction was a progression of the disease which had been previously aggravated by the compensable heart attack in 1958. Fac-

tually, in *Riley,* there was no contention or claim by Riley, that his arthritic condition since 1970 was employment-related and, therefore, *Vozzolo,* as precedent for the Court, was misapplied when it concluded that Riley's present condition may be "employment-bred" and, thereby, circumvented the clear-cut statutory definition of injury.

The Court of Appeals also cited, as authority for reaching its result, its decision in *Swinton* v. *Kelly,* 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976), asserting that an injury "need not have occurred during working hours in order to be compensable". *Swinton* is inapposite to the Court's interpretation of "injury" because there, the claimant had, in fact, suffered an injury "in the course of his employment". There was:

> ". . . no dispute as to the occurrence of the accident or the fact that any injuries associated with it arose out of and in the course of Swinton's employment. The focal issue was the extent of Swinton's injuries; specifically, "whether his back problem was causally related to the mishap on the truck." 554 F.2d 1082 (1976)

The Court of Appeals also relied upon *Butler* v. *District Parking Management Co.,* 363 F.2d 682 (1966) for the proposition that "an injury need not be traceable to any particular work-related incident to be compensable". (Pet. App. 9a) However, factually in that case, although the claimant did not suffer a mental breakdown on the job, he did become ill "during his working hours". 363 F.2d 683 (1966). Both Dr. Wisotsky and Dr. Sanchez testified that Riley's condition was related to an alleged incident ("accident") at work on November *19,* 1975 (J.A. 129 and J.A. 162), which the Administrative Law Judge found, as a fact, never occurred. Their opinions

on causality and whether Riley's preexisting arthritic condition was aggravated by a job-related injury, carry no weight on the issue of causation. *Miller* v. *O'Hearne,* 181 F.Supp. 105, 108 (D.C. Md. 1960).

The Court of Appeals correctly noted the rule of law that, in those cases where there has been no question concerning the occurrence of an injury *in the course of employment,* it will be presumed that the injury "arose out of employment". However, Riley was not in the course of employment on November 20, 1975 at 2:30 a.m., yet the Court's decision has erroneously placed Riley in the course of his employment while at home in bed. In contradiction, this same Court previously stated:

> "The Act does not, and never was intended to provide automatic insurance for every industrial accident. It was intended to pass along to industry the cost of alleviating injurious results which arise out of the employment of an injured claimant. Broadly and liberally interpreting the purpose and plan of the Act, as we are bound to do when the facts will so permit, equally, we are duty-bound to deny relief unless the injury 'arose " 'out of' the employment." *Evening Star Newspaper Co.* v. *Kemp,* 533 F.2d 1224, 1234 (1976).

To affirm the lower Court's finding that Riley's injury, suffered at home at 2:30 in the morning on November 20, 1975, was compensable (Pet. App. 10a), is to make all employers absolute insurers of the health of their employees for conditions arising on and off the job, twenty-four hours a day, and any aggravation of same which may be medically related to the physical effort of the occupation. See *Grain Handling Co.* v. *Sweeney,* 102 F.2d 464, 465 (2d Cir. 1939).

II

The Fact Of "Injury" Is Not To Be Presumed Under The Act. The Section 20(a) Presumption Does Not Apply To Help Riley Prove That His Injury Occurred In The Course Of His Employment.

The Court of Appeals reversed the Board and Administrative Law Judge because the Court erroneously determined that the presumption should have been applied on the facts to find that an "accidental injury . . . arising out of and in the course of employment" did occur, not on November 19 as Riley claimed, but on November 20, while he was home in bed.

The statutory presumptions under this Act are found in Section 20 of the Act (33 U.S.C. 920), and read in pertinent part as follows:

> "§920. Presumption
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary —
>
> (a) That the claim comes within the provisions of this chapter.
>
> (b) That sufficient notice of such claim has been given.
>
> (c) That the injury was not occasioned solely by the intoxication of the injured employee.
>
> (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

March 4, 1927, c.509 §20, 44 Stat. 1124.

When the Congressional Hearings were held, concerning the provisions which were later to become part

of this Act, the statutory "presumption" was part of the New York Act. New York Workmen's Compensation Act, McKinney's Consol. Laws, c.67 §21. In addition to New York, three other state statutes presently contain language that it shall be presumed "in the absence of substantial evidence to the contrary: that the claim comes within the provisions of [the Act]."[7]

The Longshoremen's Act of March 4, 1927, 44 Stat. 1124, followed, in the main, the workmen's compensation law of the state of New York. *West Penn Sand & Gravel Co.* v. *Norton*, 95 F.2d 498 (3d Cir. 1938). Since Section 21 of the New York Act and Section 20 of the Longshoremen's and Harbor Workers' Compensation Act were identical, we should look to the construction of the New York Courts for guidance concerning how the statute is to be interpreted. *Employers' Liability Insurance Corp.* v. *Monahan*, 91 F.2d 130, 133 (1937); *Iacone* v. *Cardillo*, 208 F.2d 696 (1953).

In *Riley*, after the Court had decided that "the record here reveals that Petitioner did, indeed, suffer an 'injury' ", (Pet. App. 8a), the Court then turned its consideration to the statutory presumption of Section 20(a) of the Act and stated as follows:

> "In cases where there has been no question with respect to the existence of an injury 'in the course of' employment, the Act has been consistently interpreted to require that the injury be presumed to have arisen out of employment as well . . . ." (Pet. App. 8a)

After reviewing *Swinton* v. *Kelly*, 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976), *J. V. Vozzolo, Inc.* v. *Britton*, 377 F.2d 144 (1967), and *Butler* v. *District Parking*

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[7] Maryland Code, Art. 101 §64(a), Oklahoma Statutes, Annotated, Title 85 §27, Alaska Statutes, §23.30.120.

Management Co., 363 F.2d 682 (1966), on their facts, and with additional citation to *Mitchell* v. *Woodworth*, 449 F.2d 1097 (1971), and *Wheatley* v. *Adler*, 407 F.2d 307 (1968) (*en banc*), the Court said:

> "The following cases make clear the pervasive scope of the statutory presumption of compensability. Indeed, no decision of this Court has ever failed to apply the presumption to any facet of any claim before it. We now hold expressly that, where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of *and in the course of the claimant's employment.*" (Emphasis supplied.) (Pet. App. 9a-10a)

The Court then noted that "by requiring the claimant to prove that the accident did, in fact, occur, the ALJ denied the claimant the benefit of this presumption". (Pet. App. 10a)

The question, therefore, arises: "who has the burden of proof in this case, and when does the presumption apply?" U.S. Industries asserts that the burden of proof was properly placed upon Riley by the Administrative Law Judge to prove an "accidental injury arising out of employment" and to further prove that it occurred "in the course of employment".

In view of the fact that once a presumption is applied, a presumed fact is treated as proved, it is important that this Court review when the presumption arises and when it does not. U.S. Industries urges that the Court of Appeals' statement that it has "never failed to apply the presumption to any facet of any claim before it", should demonstrate to this Court the need for a correct interpretation of this issue. U.S. Industries contends that the effect of universal application of the statutory

presumption to any claim or facet thereof under the Act, will extend the scope of the Act and make it accident and health insurance, covering anything that goes wrong in the human frame, since this Circuit has previously held that anything that goes wrong within the human frame is an "injury" under the Act. *Wheatley* v. *Adler*, 407 F.2d 307, 311 (1968).

Armed with *Riley*, an employee now may be in perfect health at quitting time from his usual employment, and the next day, if he has experienced an "internal failure" during the night, such as a heart attack, stroke, miscarriage, indigestion, or even the common cold, he may file his claim for workers' compensation and it will be presumed, as a matter of law, that his condition was work-related, and subject his employer to probable liability under this Act. Under *Riley*, the filing of the claim triggers the application of the statutory presumption and requires the employer to disprove the presumed fact that his condition of health was work-related.

Because this Act follows the New York Act, U.S. Industries asserts that two decisions of the New York court, construing the statutory presumption, prior to the enactment of this Act, are dispositive concerning Riley's burden of proof. In New York, by merely filing a claim, a claimant or his representative *cannot* avail himself of the benefit of the presumption that the claim comes within the provisions of the Act, i.e., that there was an "accidental injury arising out of and in the course of employment". The presumptions of Section 21 of the New York Act (Section 20 of our Act), do not relate to the fundamental question of the happening of an accident. This has been held to be a "jurisdictional fact to be supported by direct or circumstantial evidence".

evidence". *McHale* v. *Sheffield Farms Company, Inc.*, 184 N.Y. S. 576, 577 (1920). In *Lorshitsky* v. *Gotham Folding Box Co.*, 230 N.Y. 8, 12 (1920), the New York Court stated as follows:

> "It is not the law that mere proof of an accident without other evidence creates the presumption under Section 21 of the Workmen's Compensation law (Cons. Laws, Ch. 67), that the accident arose out of and in the course of the employment. On the contrary, it has been frequently held, directly and indirectly, that there must be some evidence from which the conclusion can be drawn that the injuries did arise out of and in the course of employment. . . ." 230 N.Y. 2.

Thus, the claimant and his representative must prove that the accident happened and that it occurred in the course of employment, before the presumption will arise that the accident "arose out of the employment", thus bringing the claim within the Act.

This was, no doubt, what the Court meant in *Eschbach* v. *Contractors Pacific Naval Air Bases,* 181 F.2d 860 (7th Cir. 1950), when, discussing the Section 20(a) presumption, the Court stated:

> "The fact as to causal connection between the employment and the injury is not one which is to be so presumed. In the hearing before the Deputy Commissioner, the burden was on the plaintiff to prove such fact." 181 F.2d 864 (1950).

See also, *Young & Co.* v. *Shea,* 397 F.2d 185 (5th Cir. 1968), *Furlong* v. *O'Hearne,* 144 F.Supp 266 (D. Md. 1956) *aff'd, O'Hearne* v. *Furlong,* 240 F.2d 958 (4th Cir. 1957), *Maryland Shipbuilding & Dry Dock Co.* v. *Daniel Jenkins,* 594 F.2d 404, 407 (4th Cir. 1979).

In *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935), this Court set forth the purpose of the presumption, and explained its operation. That case dealt with the presumption under Section 20(d), but the fact that *Riley* is under Section 20(a) is not distinguishable in dealing with its evidentiary effect, and whether a presumption is to arise. This Court said that "its only office is to control the result where there is an entire lack of competent evidence". Under *Del Vecchio,* in order to rebut the presumption, this Court found that an employer need only carry the burden of going forward with the evidence. The Court made it very clear that where both the employer and claimant offer evidence as to the issue in dispute, the trier of fact must resolve the matter based upon the whole body of proof, pro and con, without the Section 20 presumption.

U.S. Industries produced evidence convincing to the Judge and the Board, that Riley's injury did not occur in the scope of his employment, nor arise out of it. In *Riley,* the Court of Appeals confused the use of the presumption with the right of a claimant to *prove* a causal relationship between his medical condition and his work. Here, given the fact of no incident or accidental injury on November 19, 1975, Riley was not precluded at the hearing before the Administrative Law Judge from *proof* of causal relationship between his symptoms and his work activity; but, given the occurrence of symptoms at a time and place unrelated to his work, he does not have the benefit of the presumption. He must, therefore, prove that his injury flows from employment as effect from cause, i.e., that his condition "arose out of and in the course of employment". *Trudenich* v. *Marshall,* 34 F.Supp 486 (D.S.C. 1940). But, having chosen to proceed and pursue his claim on the occurrence of an injury (i.e., a traumatic event) on November

19, 1975, and having failed to prove that such an incident occurred at work, Riley should not, at this hour, be permitted by this decision of the Court of Appeals to retry his case on the theory of a general work-related aggravation. To permit this, would be to completely change the theory of the case upon which all parties have relied since hearings were first conducted in this matter on March 20 and March 24, 1978. (Pet. App. 20a) Fundamental fairness demands that the case end here, and this Court find that the only errors of law were those made upon review by the Court of Appeals.

III

With Or Without The Presumption, The Decision Of The Administrative Law Judge Was Based Upon Substantial Evidence.

The determination of whether a particular injury arose out of and in the course of employment, under the Act, is initially made by the Deputy Commissioner (Administrative Law Judge). In *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), this Court commented at length concerning the function of the hearing officer, and the law which requires that although facts may permit diverse inferences, the findings of the hearing officer should not be disturbed by a reviewing court. (See App. C) Both Riley's medical experts testified that there was a causal relationship between the alleged incident on November 19 and the disability which they were treating. However, these doctors expressed no opinion on the relationship between Riley's employment per se and the event on November 20 at 2:30 in the morning whether due to cardiac neurosis (J.A. 140), or arthritis.

Despite this Court's opinion in *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935), and statement about the

presumption that its only office is to control the result "where there is an entire lack of competent evidence", U.S. Industries believes that the Court of Appeals erroneously considered the statutory presumption as independent affirmative evidence, affecting the Court's review of the initial finding of the Administrative Law Judge, that the alleged incident never happened. *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314, 316 (1959). In the finding of the Court of Appeals, the Court states that there was "some dispute" as to whether Riley told his attending physicians about the accident which occurred on November 19, and whether Riley's co-worker and friend, the sole witness to the alleged accident, reported the incident the next day to the employer. These factors, plus the lack of proof of an "injury", were the basis of the defense of this action by U.S. Industries. Since the alleged incident on November 19, 1975 on the job, was unwitnessed by any employees on the job, except for Riley's close friend, Mr. Sutherland, the question of why this "accident" was reported late, and to whom it was reported, were most significant to the Administrative Law Judge. (Pet. App. 20a-26a) In addition, there were still other important facts which the Administrative Law Judge failed to mention or emphasize, which add to the weight of his opinion. These facts include testimony from the claimant that he first saw counsel about this case on December 16, 1975 (J.A. 32), and then on December 19 remembered that he "forgot" to tell Dr. Sanchez about the incident at Walter Reed Hospital on November 19, 1975. (J.A. 160) The Administrative Law Judge also did not give note or emphasize the fact that in May, June and July, 1975, prior to the November hospitalization, Dr. Wisotsky had seen Riley for arthritic pains (J.A. 134), and that Riley was carrying and taking arthritic medication on the day of this alleged injury.

(J.A. 22) He also did not include in his opinion, or emphasize the significance of Respondent's Exhibit G, the "retirement summary" Dr. Wisotsky wrote out on February 9, 1976 for the Sheet Metal Workers, wherein no mention of his November 19 "injury" is made.[8] (Respondents' Ex. G, R. 181, J.A. 115-121) He also did not mention the reports Dr. Sanchez made to the non-occupational union insurer, wherein the physician provided a negative answer to the question, "Is condition due to injury or sickness arising out of patient's employment?" (J.A. 164) A physician's answer to these questions was a "crucial fact" for denial of the claim in *Sun Shipbuilding & Dry Dock Co.* v. *Walker and Director, OWCP,* 590 F.2d 73 (3d Cir. 1978).

Accordingly, Riley's evidence, produced at the hearing, was not all affirmative, corroborative, or uncontradicted. There was, in fact, substantial evidence to the contrary, which the Administrative Law Judge chose to accept. This Court has stated that the Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. *Baltimore & Philadelphia Steamboat Co.* v. *Norton,* 284 U.S. 408 (1932). However, such language does not require that the employee always wins or the employer always loses. The evidence presented by U.S. Industries herein is sufficient to compel a finding by this Court that no injury, within the meaning of Section 2(2), occurred and that the statutory presumption was inapplicable because Riley failed to prove that his injury occurred in the course of his employment with U.S. Industries. The Administrative Law Judge's opinion should, therefore,

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[8] No mention was also made that this retirement was discussed with Riley prior to November 1975 (J.A. 139, 142).

be affirmed. *Methel Walker* v. *Universal Terminal & Stevedoring Corp., et al.*, _____ F.2d _____ (3d Cir. No. 80-2142, April 10, 1981).

CONCLUSION

The decision of the Court of Appeals in *Riley* makes the statutory presumption apply to presume work-relatedness of any condition of health of an employee, whether the first symptoms of same arose on or off the job. Such interpretation is erroneous because it constitutes a judicial amendment of the Act to eliminate the requirement that an employee prove that he sustained an "accidental injury . . . arising out of and in the course of" his employment. It is only *after* an employee produces evidence that he sustained an injury while in the course of his employment that the presumption applies to require the employer to produce evidence that the incident which happened on the job, did not "arise out of employment" or cause the injury or condition. Once evidence has been presented to support the finding contrary to the presumption, "the presumption falls out of the case". *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935). To require an employer to disprove a presumed fact that an injury occurred in the course of employment, and make the employer *prima facie* responsible for all ailments of ordinary life, has the legal effect of making the employer an insurer of the health and safety of his employees twenty-four hours a day, while on or off the job.

Although this Act is to be liberally construed, U.S. Industries believes herein that the construction placed upon it in *Riley* by the Court of Appeals was never meant to be, and cannot be justified on the basis of legislative history, nor prior judicial interpretation. U.S.

Industries, therefore, respectfully asks this Court to reverse the judgment of the Court of Appeals with direction to reinstate the decisions of the Administrative Law Judge and the Benefits Review Board.

Respectfully submitted,

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APPENDIX

APPENDIX A

U. S. INDUSTRIES, INC.

Subsidiaries

Axelson, Inc.
Wyatt Industries, Inc.
Steel Tank Construction Company
Jernberg Forgings Co.
USI Quebec Group, Inc.
USI Overseas Holdings Ltd.
  Big Dutchman (International) A. G.
  Big Dutchman (Nederland) B. V.
Brown Moulding Company, Inc.
Duke City Lumber Company, Inc.
Superlite, Inc.
  Superlite Builders Supply, Inc.
Anderson Hickey Company
USI International, Inc.
A & S Building Systems, Inc.
Gerring Industries, Inc.
Thunander & Son, Inc.
USI Puerto Rico, Inc.
Barbados Children's Wear Co. Ltd.
Oomphies, Inc.
Talbott Knitting Mills, Inc.
Young Squire, Inc.
Health Industries, Inc.
Jimlar, Inc.
Columbian Optical Company
Memphis Optical Dispensary
Northeast Optical Co., Inc.
Uhleman Optical Company of Illinois
Seaway Importing Company
Teters (Hong Kong) Ltd. (subsidiary of USI Overseas Holdings Ltd.)
USI Credit Corp.
  Caribbean Industrial Credit Corporation
  Colonial American Life Insurance Company

Credico Financial Inc.
Credico Industrial Loan Company
Credico Consumer Discount Company
Maple Credit Ltd.
Wilgross Acceptance Company, Ltd.
Maple Financial Services, Ltd.
Penn Navigation Company Inc.
Nauta Corporation
Neptune Corporation
USIGENA Canada, Ltd. (subsiriary of USI Overseas Holdings Ltd.)
USI Properties Corp.
Properties Capital Corporation
USI Charter Realty Services Corp.
Diversity Insurance Company Ltd. (subsidiary of USI Overseas Holdings Ltd.)

APPENDIX B

INA CORPORATION
and its
Subsidiaries and Affiliates

Agri Insurance Underwriters Inc.
Alaska Pacific Assurance Company
Allied Insurance Company (formerly California Food Industry Insurance Company)
Atlantic Employers Insurance Company
Bankers Standard Fire and Marine Company
Bankers Standard Insurance Company
Blyth Eastman Dillon Capital Market Incorporated
Blyth Eastman Dillon & Co. International Holdings Limited
M. J. Brock & Sons, Inc.
California Union Insurance Company
Charter Oaks Mortgage Corp.
Coast to Coast Corporation
Robert F. Coleman, Inc.
Commercial Surplus Facilities, Inc.
Compagnie d'Assurances Colina S.A.
Compagnie Financiere INA
Compagnie La Henin Vie (40% Interest)
Compagnie Nouvelle d'Assurances (99.634% interest)
COMPAR Facilities, Inc.
COMPAR Facilities, Inc.
The Continental Assurance Company of London Limited
Datamann, Inc.
Diversified Insurance Agency, Inc.
Educators Fund Management Corporation
Educators Life Insurance Company of America
Educators Marketing Services Corporation
El Paso Abstract Co.
EFMC Services Corporation
ESIS, Inc.
Extra Cover Insurance Agency, Inc.
F. S. Agency, Inc.
F. S. Title Services Inc.

Fidelity National Title Insurance Company
GAMMA INAC, Inc.
HAI International Holdings, Ltd.
Horace Mann Educators Corporation
Horace Mann Insurance Company
Horace Mann Investors, Inc.
Horace Mann Life Insurance Company
Hospital Affiliates International S. A.
Hospital Affiliates International (UK) Limited (formerly Kalvernos Limited)
Hospital Affiliates of Australia Pty. Limited
Illinois Union Insurance Company (formerly GATX Insurance Company)
INA Bond Facilities, Inc.
INA Capital Advisors, Inc.
INA Capital Management Corporation (formerly Philadelphia Investment Company)
INA Coast to Coast Corporation
INA Commercial Finance, Inc., Bedford Building
INA Community Services Inc.
INA Community Services, Inc. of Ohio
INA Conference Facilities Holding Company, Bedford Building
INA Conference Facilities, Inc.
INA Constru ::on Risk, Inc. (50.0% interest)
INA Corporation
INA County Mutual Insurance Company (affiliated by way of management contract)
INA Diversified Services, Inc. (formerly INA Insurance Services, Inc.)
INA Eagle Lodge Properties, Inc.
INA Farm Center, Inc.
INA Farmers Insurance Company
INA Financial Corporation
INA Forsikrings Aktieselskab
INA Health Care Group, Inc., Bedford Building
INA Insurance Company of Canada

INA Insurance Company of Illinois
INA Insurance Company of Ohio
I.N.A. Insurance Company Limited
INA International Corporation
INA International Holdings, Ltd.
INA International Holdings Singapore, Limited
INA International Insurance Company
INA International Insurance Company Ltd.
INA International Insurance Managers, Ltd.
INA International Investors, Ltd. (95% Interest)
INA Life Insurance Company
INA Life Insurance Company of Canada
INA Life Insurance Company of New York
INA Loss Control Services, Inc.
INA Montgomery Properties, Inc.
INA of Texas
INA Overseas Finance N.V.
INA Properties, Inc.
INA Properties of Colorado, Inc.
INA Properties of Delaware, Inc.
INA Properties Processing Center, Inc.
INA Reinsurance Company
INA Reinsurance Company, S.A. (formerly INA Assurance Corporation, S.A.)
INA Reinsurance Company (U.K.) Limited
INA Security Corporation
INA Service Company
INA Special Risk Facilities, Inc.
INA Standard, Inc.
INA Sudamericana S.A.
INA Title Insurance Company
INA Trading Corporation
INA U.K. Holdings, Ltd.
INA Underwriters Insurance Company (formerly Allied Insurance Company)
INA Underwriting Agency Limited
INA Universal Corporation (formerly BETA INAC, Inc.)

INA Whitemarsh Properties, Inc.
INAC Corp.
INAC Corp. of California
INACAN Holdings Ltd.
INACAP, S.A.
INACAP Reaseguros, S.A.
INAMAR, LTD.
INAMEX S.A.
INAMIC LTD.
INAPRO, Inc.
INAX Incorporated (2) (formerly Extra Cover, Inc.)
INAX Underwriters Agency, Inc. (formerly GATX Underwriters Agency)
Indemnity Insurance Company of North America (formerly The Stuyvesant Insurance Company)
Insurance Company of Africa (15% Interest)
Insurance Company of North America
Insurance Company of North America (Australia) Limited
Insurance Company of North America (Hellas) A.E.
Insurance Company of North America (Ireland) Limited
Insurance Company of North America (New Zealand) Limited
Insurance Company of North America (U.K.) Limited (formerly Signal Imperial Insurance Company Limited)
Insuror Management Company
International Service Corporation
International Surplus Adjusting Services
International Survey and Adjustment Co., Ltd. (37.492% Interest)
Inversiones INA Ltda. (69.362% Interest)
Investors Life Insurance Company of North America (formerly First Investment Annuity Company of America)
JTX Club, Inc. (formerly Bankard Club, Inc.)
La Nouvelle, S.A.
LATINA Holdings, Ltd.
Lewis & Norwood, General Agents, Inc.

Life Insurance Company of North America
Lime Street Properties, Ltd.
Lime Street Services Limited (formerly Eightyfare Limited)
Logan Land Company, Inc.
L. S. Holding Company
Maritime—INA General Insurance Company Limited (50% interest)
MarketDyne International, Inc.
MarketDyne of Canada Limited
Master Life Insurance Company
E. J. McConnell & Associates, Ltd. (10% interest)
Mealane Corp.
Mealane of Canada, Ltd.
Membership Assistance Corporation (formerly Membership Service Corporation)
Montgomery and Collins, Inc.
Montgomery and Collins, Inc. of Connecticut
Montgomery and Collins, Inc. of Florida
Montgomery and Collins, Inc. of Illinois
Montgomery and Collins, Inc. of Indiana
Montgomery and Collins, Inc. of Massachusetts
Montgomery and Collins, Inc. of New Jersey
Montgomery and Collins, Inc. of Ohio
Montgomery and Collins, Inc. of Pennsylvania
Montgomery and Collins, Inc. of Texas
Montgomery and Collins, Inc. of Wyoming
Montgomery and Collins Limited
National Employee Benefits Corporation
National Health Care Corporation
New Enterprise Associates L.P. (12.5% interest)
Northern Woods Products Association, Inc.
Norton Life Insurance Company
Pacific Employers Insurance Company
Paine Webber Incorporated (22.66% common stock equity interest)
Pan Arabian Insurance Company Limited (35% Interest)

Parkway Management Corporation (40% Interest)
Petroleum Insurance, Inc.
Philadelphia Investment Corporation
Philadelphia Investment Corporation of Delaware
Premier Escrow Company
Public Employees Insurance Company
Public Employees Insurance Service
Recovery Services International, Inc.
Reinsurance Consultants Limited
Richgart, Inc.
J. D. Robb & Assoc. Insurance Brokerage, Inc.
R & I Joint Venture
Sacramento Escrow Company
Self-Insurers' Management Corporation
Societe Civile Immobiliere TURINA
Southern Title Guaranty Co., Inc.
Standard Life Insurance Company of Indiana
Stellate, Inc.
Surplus Insurance Brokers of North America, Inc.
Surplus Insurance Brokers of North America, Inc.
Surplus Insurance Brokers of North America, Inc.
Teachers Insurance Company
Teachers Insurance Underwriters
The 1792 Company (42.1% Interest) (formerly INA RE Exchange Investors, Inc.)
2525 East Arizona Biltmore Circle Corporation
UNINA Insurance Company Limited (42.1% Interest)
Well-Care, Inc.

BLYTH EASTMAN DILLON & CO. INTERNATIONAL
Holdings Limited Subsidiaries

Blyth Eastman Dillon & Co.
Blyth Eastman Dillon & Co. International Limited

HOSPITAL AFFILIATES INTERNATIONAL, INC.
Subsidiaries and Affiliates

Acadiana Psychiatric Hospitals, Inc.
Affiliated Mid-West Hospitals, Inc. (Hospital Affiliates of Missouri, Inc. merged into, 8/10/79)
(1) Chicago Lakeshore Hospital
(2) Doctors Hospital
(3) Riveredge Hospital
(4) Saint Peters Community Hospital
AHS Management Services, Inc.
AHS of Newport, Inc.
AHS of Virginia, Inc.
(1) Dominion Psychiatric Center
AHS Realty, Inc.
AHS South, Inc.
AHS West, Inc.
AID Health Care Centers, Inc.
AID Health Care Centers, Inc.
AID International, Inc.

INA HEALTH CARE GROUP, INC.
Subsidiaries

Hospital Affiliates International, Inc.
INA Beaumont Acquisition Corporation
INA Healthplan, Inc.
International Rehabilitation Associates, Inc.
Alief General Hospital, Ltd. (81% Interest)
American Institutional Pharmacy, Inc.
American Psychiatric Hospitals, Inc.
American Psychiatric Hospitals of California, Inc.
(1) Woodview—Calabasas Hospital
American Psychiatric Hospitals of Houston, Inc.
Berrien County Hospital, Inc.
Centre City Hospital, Limited Partnership (38.5% Interest)
Cherry Hill Medical Center, Inc.

Clearwater Properties, Inc.
Community Health Management, Inc.
Conroe Hospital Corporation (98.2% Interest)
Cumberland Medical Center, Inc.
Dauterive Hospital, Inc.
DeKalb Convalescent & Nursing Residence Inc.
(80% Interest)
Eastwood Hospital, Inc.
Edgewood Manor, Inc.
(1) Durham Rehabilitation Center
(2) Providence Convalescent
(3) Brentwood Rehabilitation Center
Forest Park Nursing & Convalescent Center, Inc.
(1) Golf Drive Residence, Inc.
(2) Lee Convalescent Center, Inc.
(3) Manatee Convalescent Residence, Inc.
(4) Spanish Gardens Nursing & Convalescent Center, Inc.
GH Hospital, Inc.
Georgia Playcare, Inc.
(1) Playcare at College Park
(2) Playcare at Forest Park
(3) Playcare of Smyrna
(4) Playcare at Tucker
Grandview Manor, Inc.
Grant-Buie Hospital, Inc.
GULCO, Inc.
H.A.I. of Florida, Inc.
Haverford Hospital Corporation
Henrico Doctors Hospital & Diagnostic Clinic, Inc.
Hospital Affiliates Counseling Corporation of New York
Hospital Affiliates Development Corporation (formerly Health Facilities Development Corporation)
Hospital Affiliates International, Inc. S.A.R.L.
Hospital Affiliates, Inc.
Hospital Affiliates, Inc. d/b/a Allied Laboratories
(1) Allied Laboratories
(2) Lewisburg Community Hospital
(3) Diagnostic Center Hospital

(4) Hendersonville Community Hospital
(5) Del Oro Labs
Hospital Affiliates, Inc.
(1) Belhaven Hospital
(2) Tidelands Hospital
(3) Medical Center Del Oro Hospital
(4) North Shore Medical Plaza, Inc.
(5) Deer Park Hospital
(6) La Hacienda Treatment Center
(7) General Hospital of Lakewood
(8) Eastwood Hospital Building
(9) Alief Hospital Building
Hospital Affiliates International, Ltd., Inc.
Hospital Affiliates Management Co., A.G.
Hospital Affiliates Management Company of Loudon, Tennessee, Inc.
Hospital Affiliates Management Corporation (formerly Hospital Management Corporation)
Hospital Affiliates Management Corporation
Hospital Affiliates Management Corporation
Hospital Affiliates Management Corporation (formerly Hospital Management Corporation)
Hospital Affiliates Management Corporation of Georgia
Hospital Affiliates Management Corporation of St. Louis
Hospital Affiliates of Alabama, Inc.
Hospital Affiliates of Arkansas, Inc.
Hospital Affiliates of Austin, Inc.
Hospital Affiliates of Baton Rouge, Inc.
(1) Doctors Memorial Hospital
Hospital Affiliates of Florida, Inc. d/b/a Coral Reef Hospital
(1) Coral Gables Hospital
(2) Coral Reef General Hospital
Hospital Affiliates of Georgia, Inc.
Hospital Affiliates of Louisiana, Inc.
Hospital Affiliates of New Mexico, Inc.
Hospital Affiliates of New Orleans, Inc.
(1) De Paul Hospital

Hospital Affiliates of North Carolina, Inc.
(1) Orthopedic Hospital of Charlotte
Hospital Affiliates of Ohio, Inc.
Hospital Affiliates of South Dakota, Inc.
Hospital Affiliates of Virginia, Inc.
Hospital Management Consulting Corporation
Hospital Management Corporation of Ohio
Hospital Management Corporation of Sweetwater, Inc.
Hospital Underwriting Group, Inc. (48.76% Interest)
Hurst General Hospital, Inc.
Margate General Hospital, Inc.
Medical Affiliates, Ltd. (56.25% Interest)
Medicorporation Acquisition Corporation
Mental Health, Inc.
(1) Ridgeview Institute
N. C. Playcare, Inc. (11)
Neuro Affiliates Company (12) (50% Interest)
North Beach Medical Center, Inc.
North Penn Convalescent Residence, Inc.
(1)
(2) Adams Manor
(3) Doylestown Convalescent
(4) Duke Convalescent
(5) Stroud Manor
(6) Rosemont Manor
Orange Medical Complex, Inc.
Petersburg Psychiatric Institute
Peninsula Psychiatric Hospital
Program for Alcoholism, Addiction, Stress and Anxiety, Inc.
Psychiatric Institute of New Orleans, Inc. (50% Interest)
Sequatchie General Hospital, Inc.
Spring Branch Memorial Hospital, Inc.
TranScan, Inc.
Valley View Convalescent Residence, Inc. (80% Interest)
WG Hospital, Inc.
WMH Health, Inc.
Woman's Hospital, Inc.

INA HEALTHPLAN, INC.
Subsidiaries and Affiliates

HMO International
INA Healthplan of Arizona, Inc. (formerly ABC-HMO, Inc.)
INA Healthplan of Florida
INA Healthplan of Northern California, Inc.
INA Healthplan of Texas, Inc.
INA Healthplan of Tucson, Inc.
INA Healthplan of Washington, Inc.
R-L Pharmacies
Ross-Loos Health Plan of Southern California
Ross-Loos Hospital, Inc.
Ross-Loos Hospital of Los Angeles, Inc. (50% Interest)
Ross-Loos Medical Group, Inc.
Temple Insurance Company Limited

HMO INTERNATIONAL
Subsidiaries and Affiliates

California Medical Group Health Plan, Inc. d[b]a INA Healthplan of California
Coastal Insurance (Bermuda) Limited
Coastal Insurance Company (Cayman) Ltd.
Health Incorporated
Medicalab Management Corporation
Pharmaceutix, Inc.

INVERSIONES INA LTDA.
Subsidiaries

Compania de Seguros Generales INA Kappes, S.A. (99:357% Interest)
Compania de Seguros de Vida INA Kappes, S.A. (85.824% Interest)

LATINA HOLDINGS. LTD.
Subsidiaries and Affiliates

COLINA Insurance Company, Limited (formerly Abbey International Insurance Company Ltd.)
Companhia Colina de Seguros
Compania de Seguros Cruz Azul, S.A. (97.098% Interest)
Compania de Seguros Generales Philadelphia, Consolidada Agricola E. Industrial S.A. (53.4% Interest)
Contabilidad Mecanizada, S.A.
INAVEN C.A.
La Positiva Compania Nacional de Seguros, S.A. (14.95%)
La Venezolana de Vida (10% Interest)
Reaseguradora International, S.A. (20% Interest)
San Lorenzo Compania de Seguros (18.9% Interest)
Seguros Azteca, S.A. (12.96% Interest)
Seguros Colina, S.A.

PAINE WEBBER INCORPORATED
Subsidiaries and Affiliates

Abacus Fund Security Corporation
BEDARCO, Inc.
BEDCO Insurance Agency of Arizona
BEDCO Insurance Agency of Florida, Inc.
BEDCO Insurance Agency of Georgia, Inc.
BEDCO Insurance Agency of Massachusetts, Inc.
BEDCO Insurance Agency of Ohio, Incorporated
BEDCO Insurance Agency of Oklahoma, Inc.
BEDCO Insurance Agency of Puerto Rico, Inc.
BEDCO Leasing Company, Inc.
BEDCO Overseas Corporation (Puerto Rico)
BEDCO Tankers (No. 1), Inc.
Blyth Eastman & Co. S.A. (France)
Blyth Eastman Dillon & Co. Incorporated of Illinois
Blyth Eastman Dillon & Co. International Corporation (Liechtenstein)
Blyth Eastman Dillon & Co. International S.A.

Blyth Eastman Dillon & Co. (Overseas) S.A. (Switzerland)
Blyth Eastman Paine Webber Health Care Care Funding, Inc. (formerly Blyth Eastman Dillon Health Care Funding, Inc.)
Blyth Eastman Paine Webber Incorported
Blyth Eastman Paine Webber International Limited
Blyth Eastman Paine Webber International, S.A. (Panama) (formerly Paine Webber International S.A.)
Capitol Street Holding Corporation
Champlain Holding Corporation
Channelview Leasing Company, Inc.
C T Monroe Corporation
Eastdil Leasing Corp.
First Income Properties Fund, Inc.
Fitchburg Holding Corporation
Hornell Holding Corporation
Hudson Holding Corporation
Maiden Lane Leasing Corp.
Monroe-Delsea Financial Corporation
Paine Hornell Corporation
Paine Webber A.G., Zug (Switzerland)
Paine Webber Far East Limited (Tokyo)
Paine Webber Futures Management Corporation
Paine, Webber, Jackson & Curtis Incorporated
Paine, Webber, Jackson & Curtis Incorporated of Puerto Rico
Paine, Webber, Jackson & Curtis Limited
Paine Webber Mitchell Hutchins Inc.
Paine Webber Mitchell Hutchins International Inc.
Paine Webber Mitchell Hutchins Overseas Limited
Paine Webber Properties, Inc.
Paine Webber Real Estate Leasing Corporation
Paine Webber Real Estate Securities, Inc.
Paine Webber Realty Investments, Incorporated
Paine Webber Venture Management Inc.
Painweb Nominees

Pomeroy Realty Incorporated
PW Capitol Street Holding Corporation
PW Champlain Corporation
PW Fawcett Corporation
PW Fitchburg Corp.
PW Franklin Corporation
PW Freemont Corporation
PW Idlewild Corporation
PW Hudson Corporation
PW Management, Inc.
PWJC Insurance Agency (Massachusetts) Inc.
PWJC Insurance Sales (Arizona) Incorporated
PWJC Insurance Sales Incorporated
PWJC Insurance Sales (Montana) Inc.
PWJC Insurance Sales (Wyoming) Inc.
PWJC Sales Agency, Inc.
Realty Service Corporation of Delaware
Second Income Properties, Inc.
Third Income Properties, Inc.
Wyodack Construction Co.

APPENDIX C

***Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-479 (1947)**

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Thus questions as to whether an injury arose out of and in the course of employment necessarily fall within the scope of the Deputy Commissioner's authority. Section 21(b), 33 USCA § 921(b), 10A FCA title 33, § 921(b), then provides that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law."

In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the

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opposite *inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. Voehl v. Indemnity Ins. Co. of N. A. supra (288 US 166, 77 L ed 678, 53 S Ct 380, 87 ALR 245); Del Vecchio v. Bowers, 296 US 280, 287, 80 L ed 229, 233, 56 S Ct 190; South Chicago Coal & Dock Co. v. Bassett, 309 US 251, 257, 258, 84 L ed 732, 736, 737, 60 S Ct 544; Parker v. Motor Boat Sales, 314 US 244, 246, 86 L ed 184,

189, 62 S Ct 221; Davis v. Department of Labor & Industries, supra (317 US 256, 87 L ed 250, 63 S Ct 225).

It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See Boehm v. Commissioner, 326 US 287, 293, 90 L ed 78, 84, 66 S Ct 120, 166 ALR 708. It is likewise immate.'al that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. Del Vecchio v. Bowers, supra (296 US 287, 80 L ed 233, 56 S Ct 190). Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. Labor Relations Bd. v. Hearst Publications, 322 US 111, 131, 88 L ed 1170, 1184, 64 S Ct 851; Commissioner v. Scottish American Invest. Co. 323 US 119, 124, 89 L ed 113, 116, 65 S Ct 169; Unemployment Comp. Commission v. Aragon, 329 US 143, 153, 154, ante, 136, 144, 145, 67 S Ct 245. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

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